

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2249

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2249

UNITED STATES OF AMERICA,

Appellee,

—against—

HUMBERTO FLORES,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*



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1
2 UNITED STATES DISTRICT COURT

3 EASTERN DISTRICT OF NEW YORK

4 -----X

5 UNITED STATES OF AMERICA, :

6 Plaintiff, :

7 -against- : 73-CR-602

8 HUMBERTO FLORES, :

9 Defendant. :

10 -----X

11
12 United States Courthouse
13 Brooklyn, New York

14 June 28, 1973
15 11:30 o'clock a.m.

16 B e f o r e :

17 HON. MARK A. COSTANTINO,

18 U.S.D.J.
19

20
21
22
23
24 GENE RUDOLPH
25 OFFICIAL COURT REPORTER

1
2 A p p e a r a n c e s :
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4 ROBERT CLAREY
5 Assistant United States Attorney
6 Eastern District of New York

7 STEPHEN GILLERS, ESQ.
8 Attorney for Defendant

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1
2 THE CLERK: Arraignment on bench warrant,
3 Humberto Flores.

4 MR. CLAREY: Good morning, your Honor.

5 THE COURT: Good morning.

6 MR. GILLERS: Stephen Gillers for
7 Nancy Rosner, 401 Broadway.

8 MR. CLAREY: Your Honor, this is a
9 return on a bench warrant, returned by the grand
10 jury on June 19, 1973. Defendant is indicted
11 for taking part - -

12 THE COURT: Four counts?

13 MR. CLAREY: I believe it is four counts.

14 THE COURT: Right.

15 MR. CLAREY: Involving a smuggling of
16 cocaine from South America into the United States.

17 THE COURT: How does he plead?

18 MR. GILLERS: Not guilty, your Honor.

19 THE COURT: All right.

20 MR. CLAREY: Your Honor, the government
21 requests high bail in this case, of a hundred
22 thousand dollars, the reason being that this is
23 an international operation. There are still
24 two fugitives.

25 Mr. Flores travels extensively and we

1
2 have records to show that he travels extensively
3 from New York and Miami to Ecuador.

4 Other members of the ring have traveled
5 from New York and Miami to Chile, and there is
6 a, in the government's opinion - -

7 THE COURT: Is he a non-resident?

8 MR. GILLERS: He's a resident of New
9 Jersey for the last nine years.

10 THE COURT: Is he a citizen?

11 MR. GILLERS: An American citizen. He
12 was born in Cuba, your Honor.

13 THE COURT: How many times has he traveled
14 out of the country in the past year?

15 AN AGENT: How many times, that I can
16 document?

17 THE COURT: About.

18 MR. CLAREY: He has the facility to obtain
19 false passports. We have evidence that
20 done - -

21 MR. GILLERS: Your Honor, may I add an
22 important fact? Mr. Flores was arrested on a
23 warrant based on a complaint last September and
24 released in I believe \$10,000 personal appearance
25 bond. He never tried to flee while that was

1
2 pending.

3 Eventually the information based on
4 the complaint and the complaint were dismissed.

5 Now, the same underlying facts have
6 been transported to the indictment.

7 He works in a restaurant owned by his
8 retired father in Florida. He manages the
9 restaurant.

10 He's lived in New Jersey for nine years.
11 He's married and has two young children. He
12 made no resistance when arrested last night,
13 while sleeping, and he has no other convictions.

14 THE COURT: The court will place \$75,000
15 bail on him. All right.

16 MR. GILLERS: Can that be a - - Mr. Flores
17 put up - - be his own surety on that, your Honor?

18 THE COURT: No. \$75,000 bail.

19 MR. GILLERS: Surety bond?

20 THE COURT: Surety bond.

21 Give him a date in - - first available
22 date in October (addressing law clerk).

23 October the 22nd.

24 MR. GILLERS: October 22nd?

25 THE COURT: That is a Monday. For trial.

MR. GILLERS: May we have - -

THE COURT: All motions must be completed by August 31.

MR. CLAREY: Your Honor, I will represent that the government is ready to try Humberto Flores immediately, although there are two fugitives in the case.

THE COURT: October 22nd. At this point he is a jail case. Give me a date in September (addressing law clerk).

Make it September 17th. Firm date for trial, September 17th.

All motions by August 31.

MR. GILLERS: Thank you, your Honor.

* * *

100-507000-377

TO : ALL E.D.N.Y. JUDGES and
U. S. ATTORNEY

DATE: March 20, 1973

FROM : Jacob Mishler, Chief Judge

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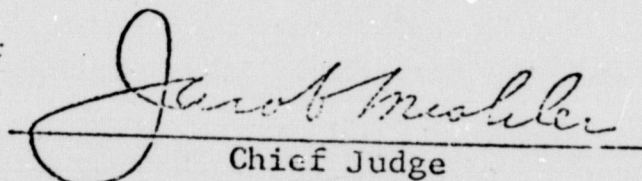
SUBJECT: Statement of Readiness

Both the Second Circuit Speedy Trial Rules which are due to expire on March 31, 1973 and the Plan for Prompt Disposition of Criminal Cases adopted by this District require that the Government be ready within six months from date of arrest, service of summons, detention or filing of complaint or of a formal charge upon which the defendant is to be tried, whichever is earliest, and within 90 days from the date of detention. Under U.S. v. Rollins, decided March 13, 1973, Docket No. 722399, the Court of Appeals indicated that in the absence of a finding of "exceptional circumstance" the failure "to file a notice of readiness" was fatal to the prosecution of the case.

The United States Attorney is seeking guidance from the court on the form and manner of the statement of readiness. It is interesting to note that the Rules do not provide for a "statement of readiness". I suggested to the U. S. Attorney that a statement at the time of pleading as to when the U. S. Attorney would be ready to try the case would be satisfactory to me. Such a statement would be entered on the docket. The statement might be in a variety of forms, i.e. on a day fixed by the court or on three days' notice by the court or ten days' notice by the court and so forth.

In my opinion a statement at the time of pleading in the presence of the defendant and to the court would be meaningful and preferable to a form notice of readiness.

It would be helpful if the procedure was standardized and I invite your suggestions.


Chief Judge

APPENDIX "A"

UNITED STATES GOVERNMENT

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MR. Bergman
DEPARTMENT OF JUSTICE

Memorandum

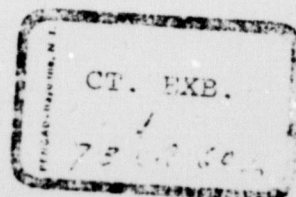
TO : All Assistants
Criminal Division

DATE: March 23, 1973

FROM : Edward John Boyd V
Chief, Criminal Division

SUBJECT: Notices of Readiness

Attached please find a memorandum from Chief Judge Mishler dated March 16, 1973, which explains the Court's position on Notices of Readiness. Please be sure to read this memorandum and to enter an appropriate statement of readiness with the Court at the time of arraignment so that we will not be faced with unwarranted dismissals under the "Six Month Rule".



1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK

A 9

4 -----X
5 UNITED STATES OF AMERICA, :

6 Plaintiff, :

7 -against- : 73-CR-602

8 HUMBERTO FLORES, :

9 Defendant. :
10 -----X

11
12 United States Courthouse
13 Brooklyn, New York.

14 October 12, 1973
15 10:30 A.M.

16 B e f o r e :

17 HON. MARK A. COSTANTINO,

18 U.S.D.J.
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23

24 JOSEPH BARBELLA
25 Official Court Reporter

1
2 A p p e a r a n c e s :

A 10

3
4 ROBERT A. MORSE
5 United States Attorney
Eastern District of New York

6 By: ROBERT CLAREY
7 Assistant United States Attorney

8 ANTHONY GRECO, ESQ.
9 Attorney for Defendant
563 West Market Street
10 Long Beach, New York 11561

11 * * *

1
2 THE CLERK: United States of America
3 versus Humberto Flores.

4 (The following took place in the
5 absence of the defendant.)

6 THE COURT: Do we need him here on the
7 motion?

8 MR. GRECO: I don't think so.

9 Can I proceed?

10 THE COURT: No. The defendant must be
11 here. And when the lawyer says it's not
12 necessary, that we can proceed without him - -
13 but I would like to have the defendant right now.

14 MR. CLAREY: Will he be able to under-
15 stand what is going on here?

16 MR. GRECO: Yes, I think so.

17 THE COURT: What are you afraid of?

18 MR. CLAREY: I am afraid he doesn't
19 speak English.

20 MR. GRECO: He speaks English.

21 MR. CLAREY: We don't want any technicalities.

22 THE CLERK: We have an interpreter down-
23 stairs.

24 THE COURT: I will talk to him and find
25 out if he speaks English.

1
2 MR. CLAREY: Sometimes he does.

3 THE COURT: Can we have second call?

4 I am going to take you as soon as he comes up.

5 We can't proceed until he comes up.

6 (Recess taken.)

7 (The following took place in the
8 presence of the defendant.)

9 THE CLERK: United States of America
10 versus Humberto Flores.

11 THE COURT: All right, let's hear the
12 argument.

13 MR. GRECO: May I proceed, your Honor?

14 If your Honor please, this is a motion
15 pursuant to the Hilbert and Scaffo cases for
16 dismissal of the indictment on the grounds that
17 this matter has been pending against them - -
18 for this defendant, Humberto Flores, for over
19 six months in contravention of Rule 4 of the
20 Second Circuit rule regarding prompt disposition
21 of criminal cases and for such other further
22 relief as this court - -

23 THE COURT: How do you arrive at that?

24 MR. GRECO: I beg your pardon?

25 THE COURT: How do you arrive at that?

1
2 MR. GRECO: Well, I will tell you in
3 a moment. At this moment, if your Honor please,
4 I offer in evidence the complaint in the case
5 against this defendant, Humberto Flores, in
6 Case No. 72 M 1842.

7 MR. CLAREY: I will stipulate to save
8 time to the dates in my chronology. I am sure
9 Mr. Greco - -

10 THE COURT: Same dates in your chronology.

11 MR. GRECO: But I want to establish a
12 record, if your Honor please, for future use.

13 I also offer in evidence - -

14 THE COURT: The file establishes the
15 record. There's no problem. It's all filed
16 papers.

17 Go ahead.

18 MR. GRECO: I also offer in evidence the
19 dismissal of that particular complaint dated - -
20 of No. 72 M 1842 dated February 23rd, 1973.

21 Now, your Honor will note from the
22 complaint that this defendant was arrested on
23 September 28th, 1972. And your Honor will also
24 note from the dismissal notice - - I presume
25 this defendant was released - - from any

1
2 liability under that - - pursuant to that
3 complaint on February 23rd, 1973. So that
4 the case pending against him for a period of
5 five months less three days.

6 Now, upon the very same facts, the
7 very same transaction, this defendant was
8 indicted on June 19, 1973.

9 Before I proceed further I should
10 mention to the court there was absolutely no
11 application either by the prosecutor or this
12 defendant's then attorney for any continuance
13 or any delay.

14 Now, as I started to say - - to continue,
15 he was - - this defendant was indicted on June
16 the 19th, 1973, as I said a moment ago, based on
17 the same facts, except that they added two other
18 parties. But he is the only one here on trial
19 before your Honor. As to the other two, I do
20 not know.

21 Now, up to the point that I appeared in
22 the - - in this matter, which was on September
23 the 17th, 1973, a period of altogether which
24 would be eight months and about three days - -

25 THE COURT: The complaint and the indictment

1
2 both.

3 MR. GRECO: Yes. My point is that as
4 in an adverse possession of real estate the
5 prior period - -

6 THE COURT: They are not the same.
7 They are not the same thing.

8 MR. GRECO: Just a moment, if your
9 Honor please. I am making my point. On the - -

10 THE COURT: You talk about adverse
11 possession. You can take my word for it, the
12 criminal part of the law is - - there is no
13 analogy to be drawn between the two.

14 MR. GRECO: Your Honor - -

15 THE COURT: Do you want to attack it?

16 MR. GRECO: Yes.

17 THE COURT: You know, I used to be an
18 expert.

19 MR. GRECO: Otherwise that section is
20 a farce. Suppose - - assume in arguendo that
21 the dismissal took place, and, say, for example,
22 six months later he was arrested again on a
23 second complaint, and then five months later it
24 was dismissed - - the complaint was dismissed.
25 That could go on indefinitely. It makes a farce

1
2 of that particular section. That's my point.

3 THE COURT: Tacking on is a - -

4 MR. GRECO: That's my point.

5 THE COURT: Absolutely nothing. You
6 can't tack on an indictment.

7 MR. GRECO: If your Honor please, do
8 you mind if I make my point?

9 THE COURT: Go ahead.

10 MR. GRECO: Your Honor is the one who
11 decides whether I am in error or not.

12 THE COURT: I have a right to answer you.
13 Wouldn't it be simple for me to just sit up
14 here and not give you an answer? That's my job.
15 I'm not - - I know what I am doing. If I
16 didn't know what I was doing I wouldn't be able
17 to catch on to what you are telling me.

18 MR. GRECO: In regard to the indictment
19 on June 19, 1973 -- that indictment is the
20 present indictment number 73 CR 602. And I
21 offer that in evidence also, if your Honor please.

22 THE COURT: The file papers are deemed
23 marked in evidence.

24 MR. GRECO: Yes. Now, that is my point,
25 however.

1
2 THE COURT: All right.

3 MR. GRECO: That the previous five
4 months less three days, whatever the case was,
5 is or should be considered tacked on to the
6 second period. And I feel that under the cir-
7 cumstances this complaint should be dismissed.

8 MR. CLAREY: Your Honor, I have made - -
9 most of what I would say here in my argument
10 which is attached to my papers. I submit that
11 we are entitled to various exceptions under
12 Rule 5. I submit that it makes no difference
13 whether we have made a motion for a continuance.
14 And this is set out in Rule 4 under the 50 (b)
15 plan. Rule 4 specifically states that the
16 Rule 5 exception - - excuse me- - if there
17 appears sufficient grounds for totaling any
18 portion of the six months under one or more of
19 the exceptions in Rule 5, the motion should be
20 denied whether or not the government has
21 previously requested a continuance. And we
22 haven't requested a continuance, but I submit
23 we are entitled to various exceptions under
24 Rule 5 (c) (1) and 5 (d). And I set those out
25 in my papers.

There is one further thing I would submit, your Honor. And there is an interesting footnote in United States versus Hilbert - -

MR. GRECO: Hilbert.

MR. CLAREY: Hilbert versus Dooling.

THE COURT: Yes.

MR. CLAREY: Which indicates that - -

THE COURT: That was a little different situation there.

MR. CLAREY: That's correct. It was a different situation. Because that - -

THE COURT: That was an indictment that went past the six months and they reindicted him after the indictment.

MR. CLAREY: It was dismissed under Rule 4.

THE COURT: I think they said he would be prejudiced.

MR. CLAREY: Dismissed under 48 (b).

THE COURT: That is altogether different.

MR. CLAREY: Where you don't have enough evidence to indict.

And, in addition, I would submit an offer of proof at this time that this defendant

1
2 was responsible for the failure to get Canas'
3 testimony, the witness who will testify at the
4 trial.

5 MR. GRECO: Judge, at the risk of
6 appearing rude - -

7 THE COURT: There is no - -

8 MR. GRECO: That would require a hearing
9 if he is going to testify. He should be under
10 oath.

11 MR. CLAREY: Well, if Mr. Greco is going
12 to object, I won't make an offer of proof. If
13 a hearing is necessary - - I have Canas downstairs.
14 I can bring him up and he can testify.

15 MR. GRECO: In that case he has to testify
16 to give his version. Besides that I don't know
17 whether this defendant was at that time represented
18 by counsel. And he was spoken to without the
19 presence of his counsel. And there may be a
20 question of whether it was proper.

21 MR. CLAREY: That is totally irrelevant
22 to the situation. He was represented by counsel
23 and he also obtained counsel for Canas. And I
24 will be prepared to present that evidence at any
25 time.

1
2 THE COURT: If the court feels the
3 evidence is necessary.

4 MR. GRECO: All right. Thank you.

5 THE COURT: Decision reserved.

6 MR. CLAREY: Thank you, your Honor.

7 THE COURT: All right.
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FILED
U.S. DISTRICT COURT E.D.N.Y.

OCT 15 1973

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X-----
THE UNITED STATES

: 73-CR-602

v.

: MEMORANDUM and ORDER

HUMBERTO FLORES

:
-----X-----
OCT 15 1973

A p p e a r a n c e s :

Hon. Robert A. Morse, U.S. Attorney, E.D.N.Y., by Robert L. Clarey, Esq., Ass't U.S. Attorney

Anthony G. Greco, Esq., 563 West Market Street, Long Beach, New York, for defendant

COSTANTINO, D.J.

Defendant Humberto Flores moves to dismiss the indictment lodged against him on the ground that the government has violated this district's plan for achieving prompt disposition of criminal cases. The defendant makes no claim that the delay in prosecution has prejudiced him in any way.

The uncontroverted facts of this case are as follows:
On September 8, 1972, the defendant was arrested pursuant to a complaint filed in the Eastern District of New York. The complaint charged that defendant conspired to unlawfully

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import illicit drugs into the United States. On February 23, 1973, the complaint was dismissed on the government's motion in accordance with Rule 48(a) of the Federal Rules of Criminal Procedure, and the defendant was released from federal custody. Thereafter, on June 19, 1973, an indictment was lodged against the defendant by a grand jury sitting in the Eastern District of New York. The indictment charged, inter alia, that the defendant had illegally imported illicit drugs into the United States and that he had conspired with other named persons to commit that crime. The charges made against defendant Flores encompassed the same set of facts which had precipitated his arrest in the Fall of 1972. The defendant was again arrested on June 28, 1973, and has been incarcerated ever since in lieu of bail of \$75,000 surety bond (reduced on August 6, 1973 to \$50,000 surety bond). On July 24, 1973 the government notified the court that it was ready to proceed to trial.

The defendant argues that under the district's plan the government was required to be ready for trial within six months of his first arrest. He contends that notwithstanding the dismissal of the complaint filed against

him, the period during which he was detained by reason thereof should be included in computing the time within which the government should have been ready for trial.

The defendant's position cannot be sustained. A dismissal pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure is without prejudice. Additionally, there is no provision in the district's plan that provides for inclusion of a period of detention unrelated to the current charges pending against a defendant. Section 4 of the district's plan reads, in pertinent part, as follows:

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention or filing of a complaint or a formal charge upon which the defendant is to be tried. . . .whichever is earliest.

Consequently as to the present indictment the operable period in which the government was obligated to be ready for trial began on June 19, 1973, the day the indictment was filed.

Accordingly the motion to dismiss the indictment is denied.

U. S. D. J.